STATE OF MICHIGAN

COURT OF APPEALS

BARBARA BLAMER,

Plaintiff-Appellant,

v

DR. HERNAN LEONES GUIANG, M.D., and MERCY HEALTH SERVICES,

Defendant-Appellee.

UNPUBLISHED
September 20, 2002

No. 231478
Muskegon Circuit Court
LC No. 00-040284-NH

Before: Murphy, P.J., and Hood and Murray, JJ.

MURPHY, P.J. (*dissenting*).

I respectfully dissent because I do not see how a statute of limitations can begin to run before a party has a basis to bring a claim. The majority opinion allows for the accrual of a medical malpractice action before there is any effect, impact, or act of any nature upon a plaintiff as a result of a doctor's instructions. The majority opinion permits a cause of action to accrue during which time period, plaintiff had no factual or legal basis to file suit as essentially nothing had occurred to her. The focus of our inquiry should be on whether a cause of action accrues at the time a doctor makes a medical decision directing the performance of a future act of patient care, or the time when that decision is actually implemented through performance of the future act, where the "act" allegedly causes the injury forming the basis of the complaint.

Here, under the majority's reading of MCL 600.5838a, defendant doctor's decision to direct plaintiff to begin retaking Diovan in one week, started the accrual period on the two-year statute of limitations despite the fact that plaintiff had yet to take the medicine. It is beyond question that plaintiff had no legal basis to file suit after defendant doctor's instructions but before plaintiff actually resumed taking the medicine and suffered the adverse reaction.[1]

[1] In some situations, such as in a negligent surgery, a medical malpractice claim may not manifest itself immediately because of a delay in the effects of the negligent act, and there initially may be a lack of an appearance of injury; however, an act has been actually committed upon the body of the patient, which set into motion the development of an injury. Here, there simply was no act upon plaintiff's body until she ingested the Diovan, and this is not a case concerning a delayed manifestation of an injury and the discovery rule.

I am in agreement with the majority that a medical malpractice claim accrues "at the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim." MCL 600.5838a(1); *Solowy v Oakwood Hospital Corp*, 454 Mich 214, 220; 561 NW2d 843 (1997). In cases such as the one before us today, I believe that the "act," as used in §5838a(1), necessarily requires an actual physical act upon a plaintiff, whether directly at the hands of a doctor or at the hands of a patient pursuant to medical instructions, and not simply the doctor's instructions to perform a future act.

I recognize that in some cases a doctor's words alone can begin the statute of limitations to accrue, such as where a doctor misdiagnoses an ailment leading a patient to believe he or she is fine without the need of further examination, but where the patient actually has a serious illness requiring early detection and treatment. There, the diagnosis would lead to a patient failing to have the illness properly treated. In that situation, there is a completed "act" immediately impacting the patient because no medical follow up would ensue with the passage of each day, thereby lowering the patient's recovery and survival chances.

Additionally, I agree with plaintiff that a portion of her claim relates to alleged omissions by defendants in failing to thoroughly examine and evaluate plaintiff during the week before she actually took the Diovan. Although defendant doctor apparently made a definitive decision in instructing plaintiff on July 30, 1998, to take the Diovan, he clearly had the time and ability to retreat from his position, reexamine and reevaluate plaintiff, change the instructions, and avoid any possible liability before plaintiff actually completed the act of taking the medicine. Had defendant doctor done so, there would have been no injury.

For clarification, I do not render the above analysis with any reliance on the discovery rule, but merely on what I perceive to be a reasonable interpretation of the term "act" as found in MCL 600.5838a(1) and applied to the unique facts of this case. I would reverse the trial court's judgment granting defendants' motion for summary disposition because the "act," for purposes of §5838a(1), did not occur until the doctor's instructions were followed and the drug ingested by plaintiff on August 7, 1998, and because negligent omissions allegedly occurred through August 7.

/s/ William B. Murphy